# INDEX



## CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 774

JAMES E. MARKHAM, AS ALIEN PROPERTY CUSTODIAN, PETITIONER

*v.*

CONSTANTINOS G. KALLIMANIS, AND CONSTANTINOS G. KALLIMANIS, AS EXECUTOR OF THE WILL OF CHRIST CORCOFINGAS, DECEASED, LATE OF LOS ANGELES, CALIFORNIA

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.**

The Solicitor General, on behalf of James E. Markham, Alien Property Custodian, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the Circuit Court of Appeals is reported at 151 F. 2d 145. The District Court wrote no opinion. Its findings and conclusions have not been reported.

## JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 26, 1945 (R. 335). A petition for rehearing was denied on October 26, 1945 (R. 336). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Where the Government seasonably appealed from a summary judgment for the defendant entered by the District Court for the Southern District of California in an action to obtain possession of and quiet title to property bequeathed to five Greek nationals which the Alien Property Custodian had vested, did the Circuit Court of Appeals properly dismiss the appeal under Rule 73 (a), Federal Rules of Civil Procedure, because of extensions of time for docketing the appeal and of assumed failure to proceed with the printing of the record?

## STATUTES AND COURT RULES INVOLVED

The pertinent provisions of Section 3 of the Act of January 20, 1944, 58 Stat. 7, 28 U. S. C., Supp. IV, 9b; of Section 73 (a) of the Federal Rules of Civil Procedure; of Rule 19 of the Ninth Circuit Rules; of Sections 7 (c) and 9 (a) of the Trading with the Enemy Act; and of California Statutes, 1941, c. 895, and 1945, c. 1160, are set forth in the Appendix, *infra*, pp. 15–20.

STATEMENT

Christ Corcofingas, a resident of Los Angeles, California, died April 5, 1942 (R. 9, 56). By will (R. 208–212) which was admitted to probate by the Superior Court for the County of Los Angeles (R. 213–214), he gave $2,000 to a resident of California and the remainder of his estate to one brother and four sisters, residents and nationals of the Kingdom of Greece. In February, 1943, respondent, Constantinos G. Kallimanis, a resident of Los Angeles, a cousin and nearest American kin of the testator and executor of the will, filed in the probate proceedings a petition for determination of heirship (R. 56–63). In that petition he invoked the provisions of California Statutes, 1941, Chapter 895 (*infra,* pp. 17–18) to disinherit the Greek beneficiaries under the will and to obtain a determination that he was the testator's sole heir at law, on the ground that Greece did not extend reciprocal inheritance rights to Americans. The Alien Property Custodian obtained continuances of this proceeding (R. 50).

Thereafter, on June 11, 1943, the then Alien Property Custodian, Leo T. Crowley, petitioner's predecessor in office, issued Vesting Order No. 1649 (R. 4) by which he vested (R. 5)

> all of the estate of Christ Corcofingas, deceased, less the payment of expenses of administration, taxes, debts, and a legacy

of $2,000.00 to Mary Lerma of Los Angeles, California.

On July 2, 1943, a hearing was held (R. 219–245) in the Superior Court on the respondent's petition to determine heirship. At that hearing, an Assistant United States Attorney filed a written appearance in behalf of the Alien Property Custodian (R. 172) and objected to further proceedings on the grounds that the net estate had, by virtue of the Custodian's vesting order, become the property of the United States and that the court was without jurisdiction to determine any interests therein (R. 226). That objection was overruled (R. 229).

On July 22, 1943, the Alien Property Custodian commenced this action in the District Court of the United States for the Southern District of California, seeking a judgment requiring delivery to himself of the net estate of the testator after administration (R. 2–6).

On July 29, 1943, a decree (R. 173–179) was entered in the Superior Court (R. 180), establishing heirship in favor of respondent Kallimanis. A motion to vacate the decree and enter a different judgment (R. 183–186), based in part on newly discovered evidence that Greece would extend reciprocal inheritance rights to Americans and in part on the asserted unconstitutionality of the California Statute, was denied on November 22, 1943 (R. 200–201). On November

24, an appeal was taken from the denial and from the decree establishing heirship (R. 202). The appeal was dismissed on July 14, 1944 (R. 83) on procedural grounds (*Estate of Corcofingas,* 24 Cal. 2d 517 (1944)), and a petition for a writ of review was denied on September 25, 1944 (R. 87).

A second amended complaint in the Federal court action, filed December 14, 1943 (R. 23–27) formed the basis of all subsequent proceedings in that action. The respondent, after answering (R. 27–44), filed a motion for summary judgment (R. 46–48), which was granted November 28, 1944 (R. 121–142). The judgment enjoined petitioner from further interfering with the possession or distribution of the estate.

On December 8, 1944, petitioner filed his notice of appeal (R. 144) to the Circuit Court of Appeals for the Ninth Circuit, and on that date the District Court stayed its injunction to the extent necessary to enable the appeal to be concluded (R. 145–146). On or about January 9, 1945, the time for filing and docketing the appeal in the Circuit Court of Appeals was extended for 20 days by stipulation of the parties (R. 309) made prior to the expiration of the time fixed by Rule 73 (g), Rules of Civil Procedure. Timely applications for successive extensions were granted by orders of the District Court (R. 286) and of the Circuit Court of Appeals (R. 287, 290) to May 7, 1945. On that day the transcript of record was filed and the appeal docketed in the Circuit Court of Appeals. At the same time peti-

tioner filed his designation of the record for printing (R. 298–301) and his designation of Parker and Company of Los Angeles to print the record (R. 297). On May 11 the respondent filed a counter designation of parts of the record for printing (R. 302).

The United States Attorney's office, on June 14, 1945, obtained from the designated printer an estimate of the cost of printing the record (R. 322) and on June 16 wrote to the Attorney General requesting authorization to expend the estimated amount (R. 326). The Attorney General authorized the expenditure by letter dated July 7, which was received by the United States Attorney on or about July 13 and transmitted to the Clerk of the Circuit Court of Appeals, who received it on July 16 (R. 338–339). Thereupon, on the same day, the clerk sent the transcript of record to the designated printer with instructions to print (R. 339).

On July 16 the respondent served on the petitioner a motion to dismiss the appeal for lack of prosecution (R. 323–325) and three supporting affidavits (R. 308, 311, 321). The motion was filed on July 18 (R. 325), on which date the clerk recalled the transcript from the printer (R. 340) to have it available for the Circuit Court in the hearing on the motion to dismiss, which was set for July 30, 1945. An affidavit in opposition to the motion (R. 325–328) was filed July 26, and

the motion was argued and submitted on the date set (R. 328). The Circuit Court's opinion and judgment dismissing the appeal under Rule 73 (a) of the Rules of Civil Procedure for failure to take necessary steps to perfect the appeal were filed September 26, 1945 (R. 329–335).

The petitioner filed a petition for rehearing (R. 341–345) on October 25, 1945, and it was denied the following day (R. 336).

## REASONS FOR GRANTING THE WRIT

Throughout the proceedings in the state and Federal Courts, the Alien Property Custodian has sought to represent the interest of the United States and to fulfill the Government's responsibility to foreign nationals with respect to the property in question.[1] The importance of the interests involved, which the dismissal of the appeal by the court below defeats without reference to the merits, results in the presentation to this Court of this petition and of the following reasons in its support.

1. *The Court below so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.*

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[1] The international aspects of the problem involved are reflected in a petition and motion of the Greek consul in the Superior Court, seeking to have that court's decree set aside (R. 91–101).

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In its opinion (R. 329–335) the court below summarized the state court proceedings which we have detailed above and the steps in the Federal court action. It then quoted a portion of its Rule 19 (*infra*, p. 15), requiring payment to the clerk of the cost of printing the record within 10 days after receipt of the clerk's estimate; noted the request to the Attorney General on June 16, 1945, for authorization to print the record; and pointed out that on July 13 the designated printer had not received any order to print the record. Characterizing the delay in printing and the previous extensions of time for docketing the record as "extraordinary" and unwarranted by the reasons advanced, the court dismissed the appeal by virtue of its discretionary authority. (R. 333–334.) The court apparently overlooked the fact that the authorization to print had been received by the clerk and that he had sent the transcript to the printer on July 16, two days before the motion to dismiss was filed.

The court also overlooked the inapplicability of Rule 19. The petitioner availed himself of the privilege afforded by the Act of January 20, 1944 (*infra*, p. 15) of designating the printer. The court below had made no change in its rules to cover printing done pursuant to such action; but the clerk, apparently recognizing the inapplicability of the Rule, did not notify petitioner of any estimate of cost of printing the record or of

any fee for preparing the record. We submit that in invoking the Rule the court manifestly erred and proceeded contrary to the statute.

The opinion below holds that the pendency of a petition for certiorari in the related case of *Markham* v. *Allen*[2] did not justify petitioner's delay in ordering the printing of the record. The court makes the erroneous assertion that in the *Allen* case the petitioner was contesting the state court's jurisdiction, whereas actually he was seeking merely to establish the Federal court's jurisdiction to determine his right to take the interest of certain alien legatees, without interference with administration in the state court. Both cases, however, involved the jurisdiction of a Federal court to determine a claim by the Alien Property Custodian to property bequeathed nonresident aliens, which the Custodian had vested, notwithstanding the pendency of administration proceedings in a state court. The pendency of the certiorari proceedings in the *Allen* case was urged as a ground for the last extension of time for docketing the appeal (R. 288–289), which was granted by the then Senior Circuit Judge (R. 290) for the reasons advanced. Moreover, delay caused by the Assistant United States Attorney's intention to recommend abandonment of the appeal if certiorari should be denied in the *Allen* case (R. 326–327), which amounted to 35

[2] Certiorari granted May 28, 1945, No. 1167, October Term, 1944. Reversed, January 7, 1946, No. 60, October Term, 1945.

days between the service of respondent's counter designation of record for printing (R. 302) and receipt of the printer's estimate of cost (R. 322), hardly merits imposition of the penalty of dismissal, even if the delay was unjustified.

The further 32 days elapsing before the clerk received the authorization to print is not unusual in government appeals in the Ninth Circuit, because of loss of time in the mails superimposed upon the time consumed by administrative safeguards surrounding the expenditure of public funds. The imposition upon the Government of a time schedule measured by the requirements of the Ninth Circuit's Rule 19 would create a serious situation. Congress has recognized that the Government is not geared to operate as rapidly as private litigants, as have this Court and its Advisory Committee on Rules of Civil Procedure. See 28 U. S. C., Supp. IV, 902; Rule 12 (a) of the Rules of Civil Procedure; and the proposed amendment to Rule 73 (a) together with the comments thereon at p. 84 of the *Second Preliminary Draft* of the Proposed Amendments. Instances of a circuit court's imposing the most drastic penalty at its command because of delay in one of the steps in perfecting an appeal which had been taken seasonably[3] are not abundant.

[3] That the petitioner was not seeking delay is shown by the fact that although the period for appeal is three months, 28 U. S. C. 230, this appeal was taken ten days after the entry of judgment.

On the contrary, the accepted and usual course has been, in keeping with the obvious intent of the framers of Rule 73 (a),[4] to dismiss seasonably-taken appeals only for extreme and inexcusable delay in their perfection.

2. *Petitioner's Appeal has Merit and its Preservation is Essential to the Protection of Important Interests for which Petitioner is Responsible.*

The conclusions of law of the District Court (R. 136–139), leading to its summary judgment in favor of respondent, include holdings that the Superior Court had jurisdiction of a claim to property vested by the Alien Property Custodian in himself and that the decision of the Superior Court rendered the issues between petitioner and respondent res judicata. The District Court found (R. 129–130) that prior to the filing in the Superior Court of the Alien Property Custodian's vesting order, the appearances by government counsel to obtain continuances in that court were made on behalf of the Greek beneficiaries of Christ Corcofingas' will. It would certainly be contended in the future, therefore, that the District Court's judgment not only bars the petitioner from further steps to assert his claim

[4] Compare Rule 73 (a)'s provision for "such action as the appellate court deems appropriate, which may include dismissal of the appeal," with the Ninth Circuit's Rule 19 "whereupon the cause will be dismissed unless good cause to the contrary is shown" (R. 333). See also *Knight* v. *People*, 151 F. 2d 534 (C. C. A. 9).

to the property in question, but also forestalls resort to legal remedies by the Greek beneficiaries themselves, should they ever be in a position to bring proceedings in an American court.

We submit there is strong ground for the petitioner's contention that the District Court was in error in its decision and that the preservation of this appeal is important to interests which should receive every consideration. The vesting of the property in petitioner remitted respondent to his remedy under Section 9 (a) of the Trading with the Enemy Act (*infra*, p. 16), see also Sec. 7 (c) (*infra*, p. 16); *Commonwealth* v. *Von Zedtwitz*, 215 Ky. 413 (1926), or to his defense of the present action, if he wished to assert his claim under the California statute. Upon the Custodian's vesting of the property (R. 56–63), the proceeding in the Superior Court became in effect a suit against property of the United States. That court had no jurisdiction of such a suit, and no officer of the United States was empowered to confer jurisdiction by appearing; nor does the court's judgment render res judicata the issues as against the United States. *United States* v. *U. S. Fidelity Company*, 309 U. S. 506; see *Kalb* v. *Feuerstein*, 308 U. S. 433.

Should petitioner ultimately prevail in this action,[5] it is probable that the property will be

[5] Not only is credible evidence of reciprocal inheritance rights in Greece available (R. 191, 195, 198), but by virtue

restored to the Greek nationals to whom the testator bequeathed it. Legislation to authorize "the President * * * to restore property vested in or transferred to the Alien Property Custodian during World War II to persons who were never hostile to the United States" (H. Rep. 1269, 79th Cong., 1st Sess.) has been passed by the House of Representatives. It is supported by the Secretary of State, the Attorney General, the Alien Property Custodian, the Treasury Department, and the Bureau of the Budget, and its enactment is likely. The Greek beneficiaries of Christ Corcofingas' will may come within its terms. The filing of this petition constitutes a final effort to safeguard their interests pursuant to the international obligations of the United States. Should the effort fail, the Greek beneficiaries would be remitted to a diplomatic claim by their Government against the United States for reparation for this Government's failure. See Freeman, *The Internation Responsibility of States for Denial of Justice* (1938), pp. 310, 315. Such an outcome is manifestly to be avoided if possible.

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of recent legislation such reciprocal rights are presumed to exist and the burden of proving their nonexistence would now be on the respondent (Calif. Stat. 1945, c. 1160, *infra*, pp. 19–20). However, if respondent should prove the nonexistence of reciprocal rights, the petitioner would contend that California Statutes, 1941, c. 895, is unconstitutional.

## CONCLUSION

For the foregoing reasons the granting of this petition is respectfully requested.

J. HOWARD MCGRATH,
*Solicitor General.*

JANUARY 1946

## APPENDIX

Act of January 20, 1944, 58 Stat. 57, 28 U. S. C., Supp. IV, 9b:

> SEC. 3. Upon request of the appellant, the record on appeal, under rules 75 and 76 of the Federal Rules of Civil Procedure, shall be printed by a printer designated by the appellant.

Federal Rules of Civil Procedure:

> Rule 73. Appeal to a Circuit Court of Appeals.
>
> (a) How Taken. When an appeal is permitted by law from a district court to a circuit court of appeals and within the time prescribed, a party may appeal from a judgment by filing with the district court a notice of appeal. Failure of the appellant to take any of the further steps to secure the review of the judgment appealed from does not affect the validity of the appeal, but is ground only for such remedies as are specified in this rule or, when no remedy is specified, for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

Rules of the United States Circuit Court of Appeals for the Ninth Circuit:

> Rule 19. Printing Records.
>
> 1. Records shall be printed under the supervision of the clerk of this court. The clerk is charged with the duty of having the printing done at reasonable rates, and he shall, upon the docketing of the cause,

cause an estimate to be made of the expense of printing the record and his fee for preparing it for the printer and supervising the printing and shall notify the party docketing the case of the amount of the estimate, which amount must be paid within 10 days. If the estimated expense is not paid as provided in this rule it shall be the duty of the clerk to report that fact to the court, whereupon the cause will be dismissed unless good cause to the contrary is shown. In such instance, the clerk shall notify the counsel for the defaulting party of the date on which the matter will be presented to the court. * * *

Trading with the Enemy Act, 40 Stat. 411, as amended (50 U. S. C., Appendix, 1–31):

SEC. 7. * * * (c) * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * *

SEC. 9 (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treas-

urer of the United States * * may institute a suit in equity * * * in the district court of the United States * * * to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

California Statutes, 1941, c. 895:

SECTION 1. Chapter 3, comprising Sections 259, 259.1, and 259.2, is hereby added to Division 2 of the Probate Code, to read as follows:

Chapter 3. Inheritance Rights of Aliens.

259. The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign countries.

259.1. The burden shall be upon such nonresident aliens to establish the fact of

existence of the reciprocal rights set forth in Section 259.

259.2. If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

SECTION 2. This act is hereby declared to be an urgency measure necessary for the immediate preservation of the public peace, health and safety within the meaning of Section 1 of Article IV of the Constitution of the State of California, and shall take effect immediately. The following is a statement of the facts constituting such necessity:

A great number of foreign nations are either at war, preparing for war or under the control and domination of conquering nations with the result that money and property left to citizens of California is impounded in such foreign countries or taken by confiscatory taxes for war uses. Likewise money and property left to friends and relatives in such foreign countries by persons dying in California is often never received by such nonresident aliens but is seized by these foreign governments and used for war purposes. Because the foreign governments guilty of these practices constitute a direct threat to the Government of the United States, it is immediately necessary that the property and money of citizens dying in this country should remain in this country and not be sent to such foreign countries to be used for the purposes of waging a war that eventually may be directed against the Government of the United States.

California Statutes, 1945, c. 1160:

SECTION 1. Section 259 of the Probate Code is hereby amended to read as follows:

259. The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee

is resident. Upon the hearing of such petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

SECTION 2. Section 259.1 of the Probate Code is hereby repealed.

SECTION 3. Section 259.2 of the Probate Code is hereby repealed.

U. S. GOVERNMENT PRINTING OFFICE: 1948

## SUBJECT INDEX.

## TABLE OF AUTHORITIES CITED.

### CASES.



### STATUTES.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 774.

JAMES E. MARKHAM, as Alien Property Custodian,

*Petitioner,*

*vs.*

CONSTANTINOS G. KALLIMANIS, and CONSTANTINOS G. KALLIMANIS, as Executor of the Will of Christ Corcofingas, Deceased, late of Los Angeles, California,

*Respondent.*

**Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.**

The respondent, Constantinos G. Kallimanis, both individually and in his capacity as executor of the will of Christ Corcofingas, deceased, wishes to resist the petition filed by the Alien Property Custodian for a writ of certiorari in the above-entitled action, for the reason that no grounds exist for the granting of this extraordinary writ.

## Questions Involved.

It seems to us that but two questions are involved in the litigation sought to be brought before this Court:

First, was the Circuit Court of Appeals for the Ninth District guilty of an abuse of discretion in dismissing the appeal of the petitioner here after months of dilatory tactics which were resulting in damage to respondent by reason of the holding up of the administration of the estate of Christ Corcofingas, deceased, in the Superior Court of the State of California, in and for Los Angeles County?

Second, did the dismissal of such appeal by the Circuit Court of Appeals constitute a miscarriage of justice when it was brought to the attention of the Circuit Court of Appeals and it appeared clearly in the record that the material issues involved in said appeal were clearly *res adjudicata* and binding and conclusive on the appellant?

## Statement of Facts.

In so far as the chronological history of this case is concerned it is set out in the petitioner's statement of the case.

At the time of the death of Christ Corcofingas on April 5, 1942, the date on which his estate would be vested in his legal heirs under the laws of the State of California, there is no dispute that, what had been at one time the Kingdom of Greece was under the complete domination and economic and military control of Adolph Hitler and the Armies of the German Third Reich. The beneficiaries named in the will of Christ Corcofingas, deceased, were with one exception living in the conquered and occupied territory that had once been the Kingdom of Greece.

Prior to the entry of the United States into the war, the Legislature of the State of California, in 1941, enacted Sections 259, 259.1 and 259.2, of the Probate Code, as cited at page 17 of petitioner's brief, which had the effect of denying to all nonresident aliens the right to inherit property in California unless, the country in which they were residing accorded similar reciprocal rights to American citizens.

Upon the filing of Mr. Corcofingas' will for probate and when the probate proceedings were ready to be closed, a proceeding to determine heirship was brought by Constantinos G. Kallimanis, respondent herein, in the Superior Court of the State of California, in and for Los Angeles County in probate proceedings then pending and over which the Superior Court of Los Angeles County had exclusive jurisdiction. (See *Silva v. Santos,* 138 Cal. 536 at 541; *King v. Chase,* 159 Cal. 420 at 424.) No question has been raised by any of the parties concerned of any irregularity in the proceedings to determine heirship brought in the Superior Court.

Upon being notified of the pending proceedings the Alien Property Custodian, through the United States Attorney for the Southern District of California, entered his written appearance in the heirship proceedings in the Superior Court [Tr. p. 64], after having obtained numerous continuances from the original hearing date of March 12, 1943 down to July 2, 1943, when the matter was finally heard. [Tr. pp. 64 and 65.] The Alien Property Custodian laid claim to the bulk of Corcofingas' estate on behalf of himself as successor in interest to the various nonresident Greek heirs. [See Tr. p. 237, and vesting order, Tr. pp. 169-171.] Testimony was taken and wit-

nesses cross-examined on behalf of his client, the petitioner herein, by the United States Attorney, who participated actively in the proceedings to determine heirship. [See Tr. pp. 220 to 245, and note the active participation of Assistant United States Attorney Clyde C. Downing in the proceedings.] After considering the evidence Superior Judge Thomas C. Gould made findings of fact and conclusions of law and a decree determining heirship in favor of Constantinos G. Kallimanis *and expressly finding that no alien had any right, title or interest in or to the estate of Corcofingas,* nor did the Alien Property Custodian of the United States, petitioner herein, succeed to or have any interest therein. [See Tr. pp. 69 and 71.] A decree was entered accordingly.

**The Subsequent Proceedings.**

The United States Attorney, on behalf of the Alien Property Custodian, on September 27, 1943, filed a notice of appeal to the Supreme Court of California from the decree determining heirship. On October 16, 1943, the United States Attorney dismissed the appeal in writing without reservations. On November 24, 1943, the United States Attorney filed a second notice of appeal to the Supreme Court of California, this time from the original decree and also from an order denying his motion to enter a new and different judgment. A motion was made by Constantinos G. Kallimanis in the Supreme Court of California to dismiss the second appeal, on the ground that the attempted appeal from the original decree was barred by reason of it not being taken within the time prescribed by California law (Rule 2a, Rules on Appeal) and that the order denying the motion for a new and different

judgment was not an appealable order. This motion was granted by the Supreme Court of California (See *Estate of Christ Corcofingas,* 24 Cal. (2d) 517), but not on procedural grounds as urged by petitioner on page 5 of his brief. The Supreme Court of California granted the motion on the ground that the Court lacked jurisdiction to entertain the appeal as having been taken too late. Thereafter the Alien Property Custodian attempted to obtain a writ of review (certiorari) in the Supreme Court of California, which writ was denied. [Tr. p. 87.]

In the meantime, after the trial of the proceeding to determine heirship in the Superior Court but before the entry of the formal findings of fact, conclusions of law and decree in that Court, on July 23, 1943 [Tr. p. 71], petitioner here filed an action under date of July 22, 1943, in the United States District Court for the Southern District of California, again seeking to claim the same property involved in the State Court proceedings. [Tr. pp. 2 to 6.] A motion to dismiss was filed on August 14, 1943 [Tr. pp. 7 and 8] which was followed by an amended complaint. [Tr. pp. 8 to 20.] A motion was made to dismiss the amended complaint on October 5, 1943 [Tr. pp. 20 to 22] and the Alien Property Custodian then proceeded to amend a second time. [Tr. pp. 23 to 26.] By this time the proceedings in the State Courts had been terminated by the order of the Supreme Court of California dismissing petitioner's appeal and the defendant answered the second amended complaint pleading *res adjudicata* as one of the defenses interposed to the second amended complaint. [See Tr. p. 33 *et seq.*] Thereafter respondent filed a motion for summary judgment in the District Court under the provisions of Rule 56 of the Federal Rules of Civil Procedure, urging their right to a decree by reason

of the issues having become *res adjudicata,* which motion was supported by the affidavit of Benj. S. Parks [Tr. p. 48] to which was attached certified copies of the essential documents in the proceeding to determine heirship in the Superior Court, ending with the order of the Supreme Court of California dismissing the appeal. [Tr. p. 55 *et seq.*]

Upon disposition by the Supreme Court of the petition for writ of review the record in the motion for summary judgment was further supplemented by a second affidavit of Benj. S. Parks [Tr. p. 85 *et seq.*] to which was attached a certified copy of the order of the Supreme Court of California denying the petition for writ of review.

District Judge Peirson M. Hall after a hearing on said motion thereupon on November 28, 1944, rendered judgment in favor of the defendant and respondent here, from which petitioner appealed to the United States Circuit Court of Appeals for the Ninth Circuit, after obtaining a stay of execution under date of December 8, 1944. [Tr. pp. 145-46.]

From the date of Judge Hall's decision, November 28, 1944, the record shows a consistent series of delays in perfecting the appeal to the Circuit Court of Appeals and bringing the issues to a determination. After having served and filed his notice of appeal on December 8, 1944, petitioner did not designate his record on appeal for almost two months, filing it on the following January 29.[1] Counter-designations of parts of the record on appeal

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[1]Tr. p. 149 seems to indicate that the designation of record on appeal was filed January 29, *1944.* Obviously this is an error in the record as the judgment was not entered until November 28, 1944.

were filed by respondent within ten days thereafter, February 8, 1945. Points on which the appellants intended to rely were not filed until March 6, 1945. On March 5, 1945, the Assistant United States Attorney, representing petitioner ,filed an *ex parte* request with Judge Albert Lee Stephens of the United States Circuit Court of Appeals for the Ninth Circuit, and obtained an extension of time to file his record and docket his appeal to April 6, 1945, on his representation, that, although District Judge Hall had signed an order extending the time to file the record and docket the appeal up to March 7, 1945, the time was insufficient for him to properly perfect his appeal. [See Tr. pp. 286-87.] Thereafter, twelve days before the extended time expired, Mr. Downing swore to another affidavit under date of March 24, 1945, asking for another extension of time *ex parte*, on his representation, in this instance, that the case of *Allen v. Markham* was pending on petition for writ of certiorari in the United States Supreme Court and that *some of the issues involved in said case of Allen v. Markham were involved in the case at bar.* He did *not* state to the Circuit Court of Appeals, to whom this application was being made, that no issue of *res adjudicata* was involved in the case of *Allen v. Markham*, but that such issue *was* involved in the case at bar, nor did he state that there had been a final decree of heirship in favor of the appellee here, in the Superior Court of the State of California, which had long since become final by reason of the dismissal of his appeal, and which decree determined that the aliens in question or their reprsentative, the Alien Property Custodian, had no interest in the estate. This affidavit was presented to Judge Curtis D. Wilbur of the United States Circuit Court of Appeals *ex parte and without notice to respondent.* On the strength of such affida-

vit Judge Wilbur extended the time to file the record and docket the appeal to May 7, 1945.

As a result of these repeated *ex parte* extensions, Thomas S. Tobin, one of counsel for the respondent, wrote Judge Wilbur under date of April 28, 1945, asking that we be given an opportunity to be heard on any further application for extensions on the part of the appellant. [See affidavit of Thomas S. Tobin in support of motion to dismiss appeal, Tr. pp. 308-9.] Further extensions were thereupon refused by the Circuit Court in the absence of a regular motion. [Tr. p. 315.] The statement of points on which appellant intended to rely was filed in the Circuit Court of Appeals on the last day of the extended time, May 7, 1945. [Tr. p. 297.]

The printer designated to print the record on appeal in Los Angeles, California, was designated on March 3, 1945 [Tr. p. 297] and within a short time thereafter the printer made an estimate of cost of printing the record. [See Tr. p. 322.] He was easily available to counsel for petitioner here. No copies of the printed record were served on counsel for respondent up to and including the 9th day of July, 1945 [See affidavit of Thomas S. Tobin, Tr. pp. 308-11], and more than sixty days had elapsed since the record had been docketed in the Circuit Court of Appeals after numerous extensions. The result was the filing of a motoin to dismiss the appeal on July 18, 1945, supported by the affidavits of Thomas S. Tobin, Benj. S. Parks and Robert Parker, the printer. [Tr. pp. 307 to 324.] The motion sought to dismiss the appeal by reason of the dilatory tactics of the appellant, his lack of diligent prosecution of the same, and to inexcusable negligence in perfecting his appeal.

That the tactics of appellant were dilatory is clearly evidenced by the affidavit of Benj. S. Parks, one of the attorneys for appellee, in which [Tr. pp. 319-20] Mr. Parks declared on oath that the Assistant United States Attorney handling this matter twitted him with the fact that neither he nor his client would ever live long enough to enjoy any of the fruits of the Corcofinas estate. This affidavit made by a member of the bar of the United States Circuit Court of Appeals for the Ninth Circuit stands absolutely undenied, although Mr. Downing made a rather feeble counter-affidavit seeking to excuse the delay. [Tr. pp. 325-27.] At the time of the hearing on the motion to dismiss the appeal the record had still not been printed, and we do not believe that it was ever printed until the petition for writ of certiorari to this Court was under preparation.

Thus the party decreed by a final decree of the Superior Court of Los Angeles County, State of California, to be the rightful heir to the estate of Christ Corcofingas, deceased, has been delayed and obstructed from March 12, 1943, the original trial date set in the heirship proceeding in the Superior Court [Tr. p. 64] for a period of three years, before this Court will rule on the granting or denying of a writ of certiorari, as we assume there will probably be no ruling until March, 1946. All of these delays, without exception have been occasioned by the Alien Property Custodian and his counsel, through repeated requests for continuance, extensions and whatnot, and for no good reason at all, and none of them have been occasioned by any dilatory tactics on the part of respondent here.

## The Law.

Was the Circuit Court of Appeals guilty of an abuse of discretion in dismissing this appeal?

Rule 19 of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit was promulgated for the purpose of expediting the disposition of appeals. It requires an appellant to deposit with the clerk within ten days, the amount estimated necessary to print the record. If such deposit is not made it is made the duty of the clerk to report the fact to the Court, whereupon the cause will be dismissed unless good cause to the contrary is shown. While the Government of the United States is probably excused from the necessity of making a formal deposit with the clerk to cover the expense of printing the record there is nothing in the Rule that excuses it from expeditiously procuring the printing of the same. In the case at bar no effort was made by the United States Attorney's office to obtain authority to make the expenditure until their letter written June 16, 1945. [See affidavit of Benj. S. Parks, Tr. pp. 318-19.] No reply to their letter was received by the United States Attorney until July 13, 1945 [See letter United States Attorney, Tr. p. 338], a comparatively short time prior to the preparation and filing of the motion to dismiss the appeal.

Appellant at pages 9 and 10 of his petition states that petitioner delayed thirty-five days from May 7, 1945, the last day to which the Circuit Court had extended petitioner's time to file the record, and then, only thirty-two days thereafter, before ordering the printing, thereby attempting to make it appear that these delays were minor and usual, and excusing these delays by saying petitioner was awaiting the decision in *Markham v. Allen.*

In this connection we wish to point out that the original extensions were for the purpose of allowing appellant to designate his record and have it printed, so that all of this should have been done prior to May 7, 1945, at the very latest, petitioner having had the statutory and extended time within which to do so, amounting to a total of five whole months, and then, in the face of refusal of a stipulation or further order of Court [Tr. pp. 308, 315], appellant proceeded on his own responsibility to take an additional sixty-seven days on top of the five months, or a total of in excess of seven months, just to designate petitioner's record and get it printed and filed, and then the record still was not printed or even started to be printed.[2] When considered in this light the Circuit Court was clearly justified in granting the dismissal, on the grounds that the delay was extraordinary.

Appellant at page 10 of his petition also refers to certain proposed amendments to the Rules to apply to government appeals, and which would recognize the petitioner's inability to move fast. We submit these Rules have not been passed, but even if they had been, we doubt if they would allow the petitioner to take more than seven months to designate petitioner's record and get it printed and filed and still not have the printing of the record started, as was the case here. We submit that the Rules of the Circuit Court were meant for all litigants, government as well as private, and that the government should abide by the Rules the same as any private litigant. To rule otherwise would create chaos.

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[2]Note affidavit of printer, Tr. 322, in which he states he furnished oral estimate two or three months prior to June 14, and written estimate on June 14, and on July 13 still had not received order to print.

The question of whether the Circuit Court holding that the delay was unjustified for the reason advanced by petitioner for the delay, we will refer to later in discussion of the case of *Markham v. Allen,* and whether it was in any way applicable to this case.

The petitioner, at page 11 *et seq.* of his petition, refers to certain findings of the District Court, particularly referring to the finding that the Superior Court had jurisdiction of a claim of the Alien Property Custodian to property vested by him and that a decision of the Superior Court rendered the issues in the District Court *res adjudicata.* This statement does not correctly state the findings of the District Court. [Tr. pp. 121-139, incl.] The District Court did find that the Superior Court in probate did have exclusive jurisdiction to determine heirship, that is, jurisdiction to determine whether a resident and citizen of the United States (Kallimanis) or certain aliens (Greek heirs) were entitled to inherit. Until it had been determined that the Greek heirs were entitled to the estate the Alien Property Custodian had no possible right or claim to the estate or any part thereof, and the Vesting Order of the Alien Property Custodian could vest only the possible contingent interest, if any, of the Greek heirs. This clearly was not a finding that the Superior Court in probate had exclusive jurisdiction to determine a claim of the Alien Property Custodian to specific property. We do not deny that had the Superior Court by a final decree held that the Greek heirs were entitled to inherit, that the Federal District Court would then have had jurisdiction to determine the rights of the Alien Property Custodian to receive distribution to him of the estate. *In fact, we would not have contested such an order but would have*

*distributed such assets to him without any Federal Court action.*

The other finding complained of by petitioner refers to the finding that the Alien Property Custodian appeared on behalf of the Greek heirs. It is not necessary to advise this Court of the nature of a Vesting Order of the Alien Property Custodian. Suffice it to say that if the Alien Property Custodian had any right to the estate it was by virtue of the interest of the Greek heirs, if any, or not at all, and if the Greek heirs had no interest the Alien Property Custodian had none, and if they had any interest it belonged to the Alien Property Custodian, so the Greek heirs and the Alien Property Custodian are one and the same. If the Alien Property Custodian's contentions are correct, he has no standing in Court except as he stands in the shoes of the Greek heirs. That this is the case is conclusively shown by petitioner's statement in his petition herein that legislation is now pending to authorize the President to restore property taken by the Alien Property Custodian to the aliens. If the Greek heirs have any rights independent of the Alien Property Custodian, why is legislation necessary? It is rather absurd for petitioner to claim that this Court should grant certiorari in this case because legislation is proposed that *may* be enacted and *may* be made to apply to these Greek heirs.

The petitioner refers in his petition and sets forth in full at page 19, section 259 of the Probate Code of the State of California, as amended effective September 1945. This amendment of section 259, Probate Code, could not possibly have any effect on any of the issues involved in this case, since all of the trials and proceedings in both the State Courts as well as the Federal Courts had been fully

heard and disposed of long before this amendment became effective.

Would a miscarriage of justice result from the denial of this petition?

It is contended by appellant that momentous international issues are involved in this case which necessitate a review by this Court. He calls attention of the Court to the reversal by this Court of the case of *Markham v. Allen,* decided January 7, 1946, 66 Supreme Ct. Reporter 296. An examination of that case will indicate that the issues involved there and the issues in the case at bar were and are in nowise identical. Nowhere in the case of *Markham v. Allen* was the question of *res adjudicata* involved. That case turned purely on the question of jurisdiction of the United States District Court to entertain an action brought by the Alien Property Custodian to recover alien property.

We do not question for one moment the jurisdiction of the United States District Court for that purpose.

We do, however, submit that where another Court of competent jurisdiction, as in the case at bar, has entered a formal decree, in which both parties to the litigation in the United States District Court were parties, decreeing that one of them either has or has not any interest in the estate of the decedent, *that judgment is binding and conclusive on the United States District Court and on all other Courts of the land.* We note with interest the short special concurring opinion of Mr. Justice Rutledge in *Markham v. Allen,* in which he expresses the belief that the *Allen* case should be remanded to the District Court to *await the outcome of the pending and undetermined heirship proceeding in the Superior Court of the County in*

*which the estate was being probated.* We note also that in the *Allen* case, at the time of the proceedings in the United States District Court an heirship proceeding was pending untried and undetermined. In the case at bar the heirship proceeding was determined in the Superior Court, with the Alien Property Custodian participating vigorously and actively as a party litigant. It is true that the action in the District Court here was filed one day before the formal signing of the judgment of the Superior Court, but any lawyer knows that between the date of the decision of a case by a judge from the bench, and the preparation, approval as to form and signing of findings of fact, conclusions of law and a decree, some time must necessarily elapse, many times, several weeks. The action in the Superior Court was tried and concluded by oral decision from the bench on July 2, 1943, and the formal findings and decree signed July 23, 1943. The action in the case at bar was filed in the United States District Court on July 22, 1943, just one day before Superior Court Judge Thomas C. Gould signed the formal Superior Court judgment, which has long since become final. Thus we have a situation entirely distinct from that in the *Allen* case where, so far as we know, the proceedings to determine heirship have not as yet been tried. It would seem to us from the reading of the opinion of this Court that it is the Court's idea that the District Court of the United States would be required to follow the mandates of the decree of the Superior Court determining heirship. In other words, if the Superior Court probating the Allen estate, decrees that a German alien had an interest in that estate, that interest should be turned over to the Alien Property Custodian; but conversely, if the decree of the Superior Court should hold that no alien has any interest

in said estate, it would then follow that the United States District Court must enter a decree denying relief to the Alien Property Custodian.

The case at bar is in many respects similar to *Napa Valley Electric Company v. Board of Railroad Commissioners of California* (251 U. S. 366, 40 S. Ct. Reporter 174.) In that case an action was instituted in the United States District Court in equity by the Napa Valley Electric Company against the Board of Railroad Commissioners of California *et al.*, involving among other issues, the constitutional rights of the plaintiff. The issues had been heard and determined, previously thereto, before the Commission, with unfavorable results to the Napa Valley Electric Company. It petitioned the Supreme Court of California for certiorari, or review, and without passing on the merits of the case or filing an opinion the Supreme Court of California denied certiorari. Thereafter the Napa Valley Company instituted the action in the United States District Court against the Commission and was met with the same plea that the petitioner here was met with, namely, that the issues involved were *res adjudicata.* The District Court dismissed the bill and on appeal this Court held that the issues involved in the State Courts were *res adjudicata.* As was said by Mr. Justice McKenna:

> ". . . and we agree with the District Court that the denial of the petition was necessarily a final judicial determination based on the identical rights asserted in that Court and repeated here."
>
> *Williams v. Bruffy,* 102 U. S. 248, 255; 26 L. Ed. 135.

This Court further cited the following:

*Calaf v. Calaf,* 232 U. S. 371;

*Hart Steel Co. et al. v. Railroad Supply Co.,* 244 U. S. 294,

and affirmed the decree of the District Court.

It will be noted in the case at bar that nowhere did petitioner in pursuing his delaying tactics call the attention of the Circuit Court of Appeals to the fact that the additional issue of *res adjudicata* was involved here by reason of the final decree of heirship in the Superior Court while it was in nowise involved in the *Allen* case. We believe that the Circuit Court of Appeals felt that it had been imposed upon. Judge Garrecht in his opinion points out that in the *Allen* case the Alien Property Custodian had not submitted himself to the jurisdiction of the California Probate Court but contested the same. He might well have pointed out also that nowhere in the *Allen* case was the issue of *res adjudicata* involved, as is the case here.

We submit that to grant certiorari in the case at bar would be to strip Circuit Courts of Appeal of any discretion to dismiss dilatory or non-meritorious appeals. The judgment of the lower courts herein could not be reversed without overturning the ancient doctrine of *res adjudicata,* which is as old as our law itself, and would create confusion as to the finality of any judgment or decree throughout the entire United States.

The Federal Rules of Civil Procedure were adopted for the purpose of expediting procedural steps in the perfect-

ing and prosecuting of appeals, and disregard of them will justify the Appellate Court in dismissing the appeal, either on motion or at the time of the hearing of the appeal on its merits. (See *U. S. ex rel. Rempus,* 123 Fed. (2d) 109; *Morrow v. Wood,* 126 Fed. (2d) 1021.)

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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